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France re-instates ban on U.S. cherry imports

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Report Highlights:
On April 27, 2017 France published a decree banning cherries imports from countries where the use of the chemical dimethoate is legal. As a result, U.S. cherry exports to France will be prohibited in 2017 as they were in 2016. The action will also create competitor opportunities in other EU markets, as the French cherry crop is likely to be smaller and more expensive due to the ban on the use of dimethoate. Fruit importers and traders fear that France may one day implement similar domestic bans against other EU-approved pesticides or chemicals, de-facto shutting down the free movement of EU and third-country fruits and vegetables into France.

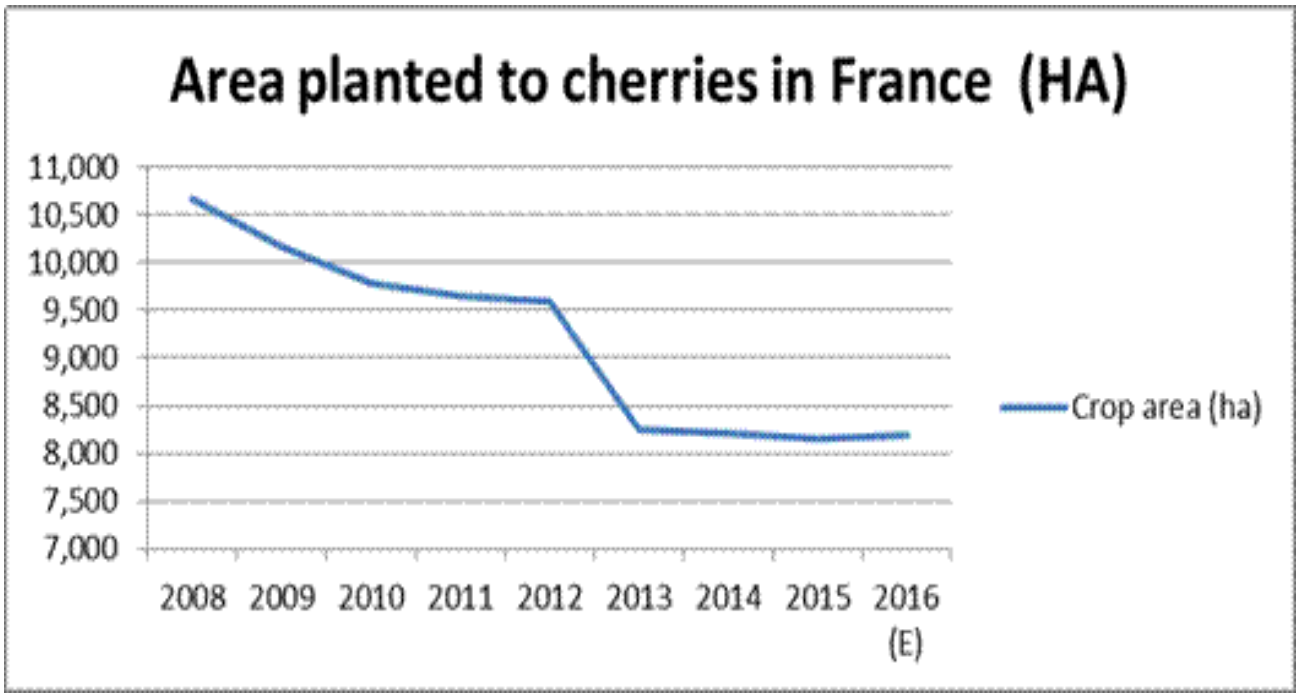
Executive Summary:

On April 27, 2017 France reinstated the ban of the import and sales of cherries imported from countries where the chemical product dimethoate can be used on cherries and cherry trees. Such a ban was in place between April 22 and December 31, 2016. France's decision followed the ban of the chemical compound for domestic production. Dimethoate was used to control Drosophila suzukii, an Asian fruit fly which causes considerable damage in cherry orchards but is suspected by France of being dangerous to human health. France imports roughly one fifth of its cherry consumption, the bulk coming from EU countries including some (such as Spain and Germany) that have already banned dimethoate. The French prohibition means the United States cannot export cherries to France which were valued at around $1 million (2015) annually before the ban. On the other hand, as France's production is likely to be impacted by the ban on the pesticide, French cherries are likely to be scarcer and more expensive, creating opportunities for competitors in traditional French export markets such as the UK. The French Ministry of Agriculture also set a €5 million program to subsidize the income of French cherry producers impacted by Drosophila suzukii related losses.

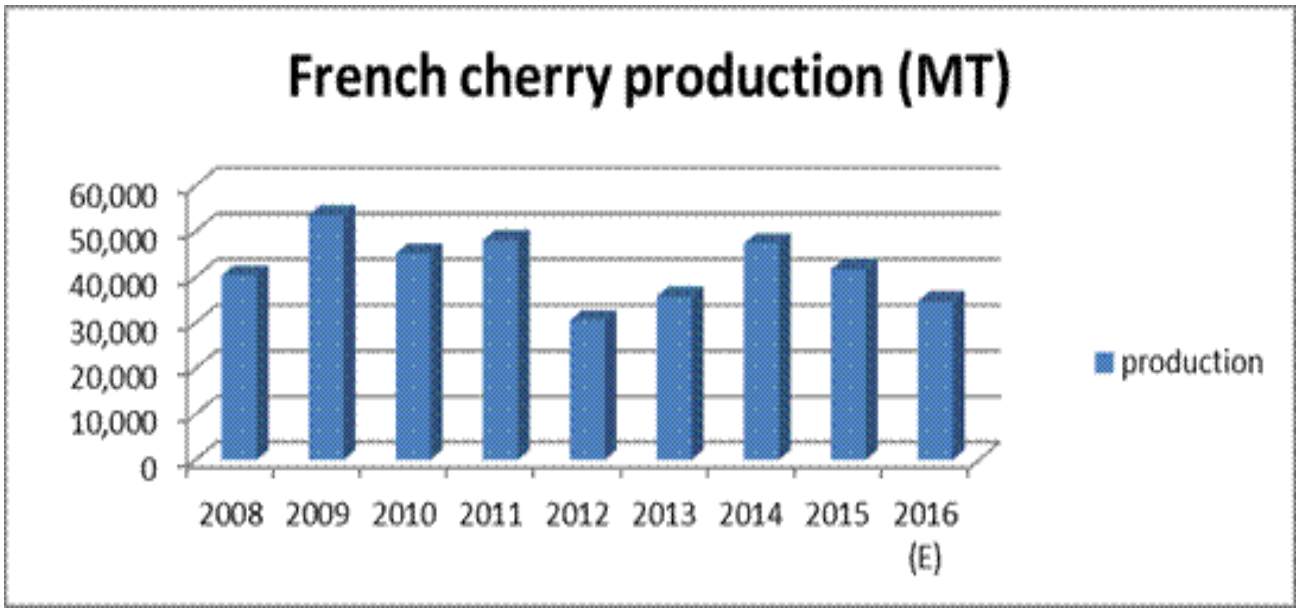
Fruit importers and traders fear that France may soon implement a similar domestic ban against other EU-approved pesticides or chemicals, de-facto shutting down the free movement of EU and third country fruit and vegetables into France.

Overview of the French cherry production and trade

France is a minor producer of cherries in the EU. Most of the production is concentrated in the south and southwest of France. The area planted with cherry orchards has been declining for years :

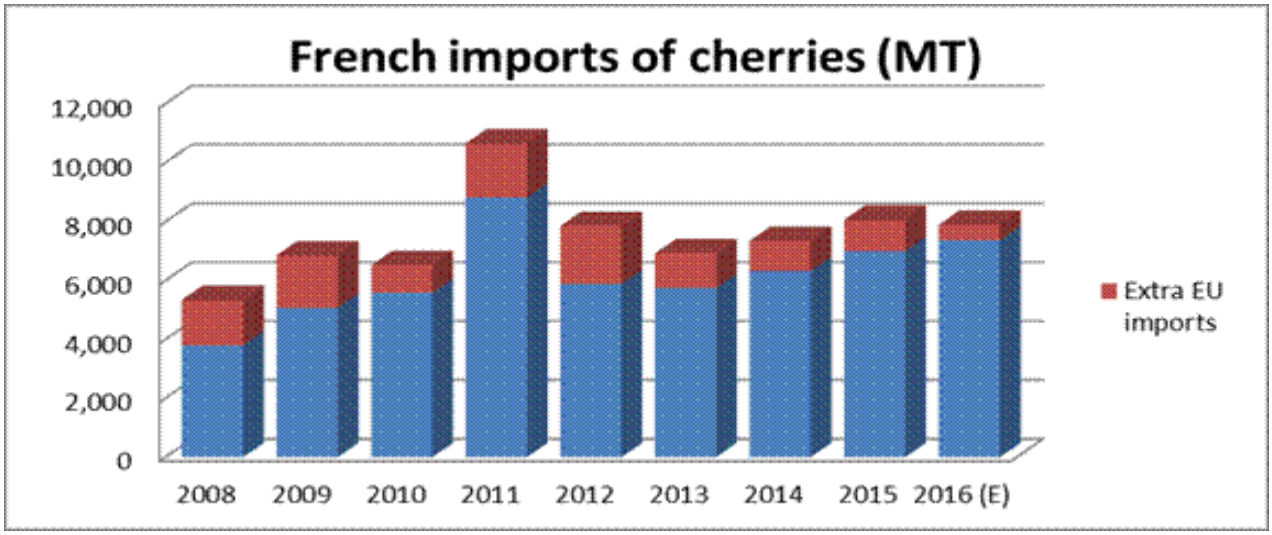


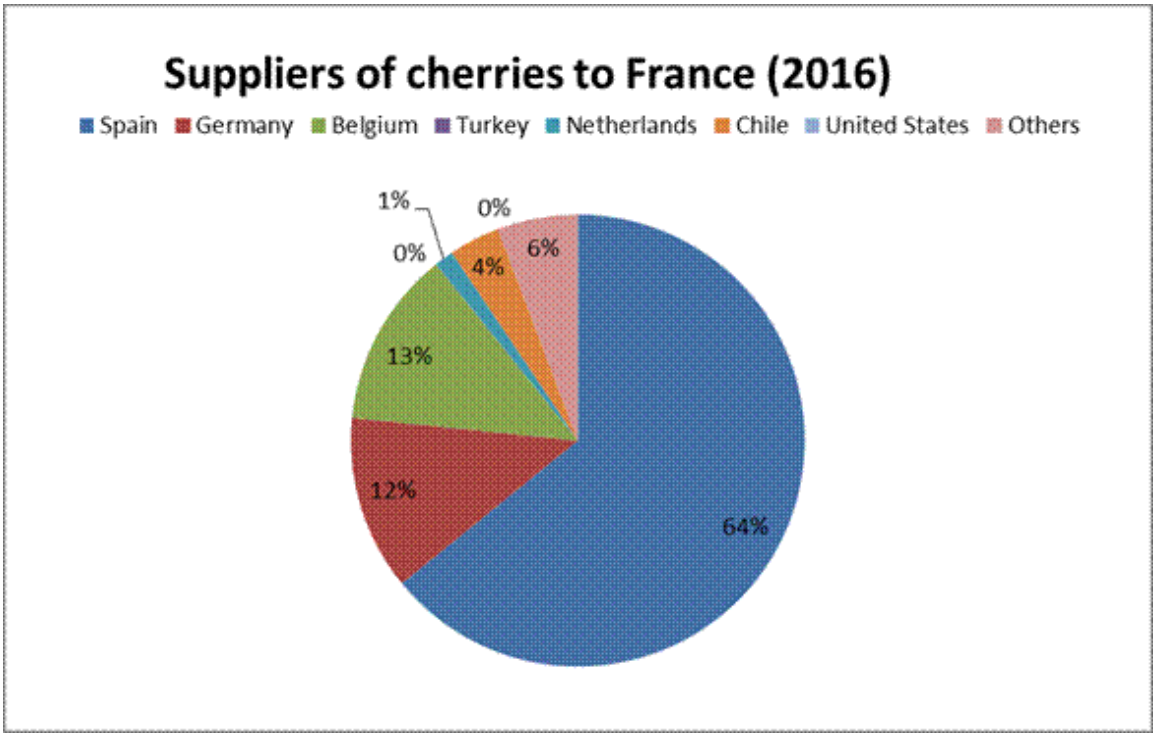
The French production has also been declining steadily over the past few years:



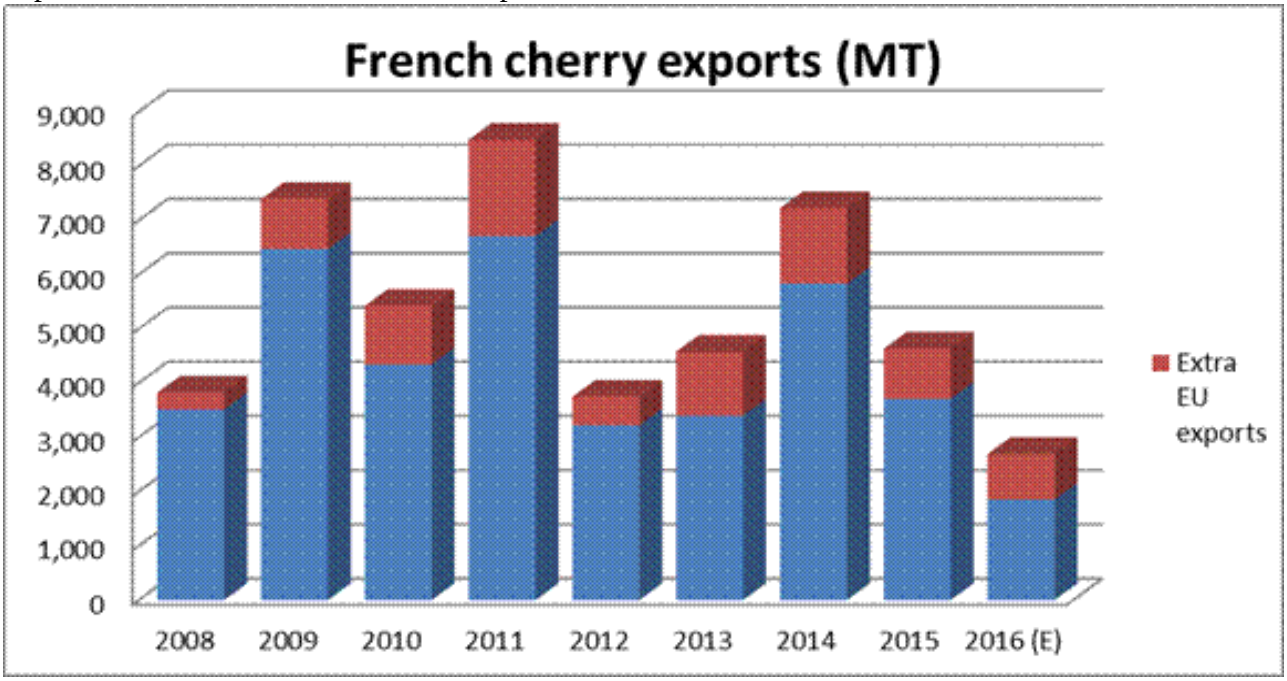
France is a net importer of cherries. Before the ban on dimethoate, the bulk of imports were from the EU (Spain, Belgium, and Germany), with a small share from Turkey. The United States had a niche market for late summer cherries (from mid-July to August). Chile is the main supplier of winter cherries. Note that almost half of cherries listed as imported from Netherlands were in fact U.S. (or Canadian) cherries custom cleared in the Netherlands. French imports of U.S. cherries (mainly from Oregon and Washington) were valued at about $1 million annually before the ban.

The impact of the ban was immediate, with no imports from the United States and from Turkey in CY 2016. Chile was not impacted by the ban.





France exports cherries mostly to neighboring countries, such as Germany, Belgium and UK. The 2016 exports were lower because of limited production.



2016 France blockade of cherry imports

On April 22, 2016, France banned the import and sale in France of cherries produced in countries that do not prohibit the use of insecticides using dimethoate as the active compound on cherry trees. France used the safeguard clause permitted by Article 54 of EU Regulation 178/2002 to set up such restrictions

on trade.

This decision followed France the Food and Environment Safety Agency (ANSES) decision in February 2016 not to renew the approved use of dimethoate on cherries (as well as on olive, asparagus, cabbages and rose trees) due to suspected danger to the human health. Dimethoate was the active compound used in pesticides, such as Dimate BF 400 produced by the Danish Company Cheminova A/S, the agrochemical branch of the U.S. chemical group FMC. It was widely used to fight against the invasive fly Drosphila suzukii, an Asian fruit fly which appeared in France in 2010. Larvae of Drosphila suzukii (up to 18 generations per year) feed on the growing cherries (as well as on grapes and other summer fruits). The attacked cherry rots and rapidly spreads the rotting to neighboring fruits. The loss can be close to 100 percent on infected orchards.

source : l'Arboriculture Fruitière

Dimethoate has been recognized as one of the most effective pesticide against Drosphila suzukii. The French Ministry of Agriculture has exceptionally and temporarily (for 120 days starting on 04/2016) authorized 3 chemicals (cyantraniliprole from DuPont, spinosad and spinetoram from Dow) to be used on cherry trees. Apart from using pesticides, the only other efficient solution is to use nets around trees and orchards, at a cost of at least € 25,000 per hectare according to cherry producers (versus € 100 per ha for chemical treatments).

In 2009, the European Food Safety Agency (EFSA) reduced the MRL for dimethoate from 1 ppm (Codex is 2 ppm) to 0.2 ppm, a move which was confirmed in 2015. The Canadian Health Agency confirmed the 2 ppm MR in 2015.

In 2016, after a very mild and wet winter**, French cherry producers faced significant losses to the fly**, which made French cherries rarer and more expensive (due to the necessary sorting of the rotten fruits after harvest). French cherry producers started to demonstrate in March 2016 to protest against the ban and ask for a protection against what they called an unfair competition from other countries, such as Turkey which had not banned dimethoate. The cherry producers' association (joined by other fruits and vegetable organizations) went to court in March 2016 to ask the highest French Administrative Court

(Conseil d'Etat) to strike down the negative opinion of ANSES of February 2016. However, the litigation may take years before reaching a legal conclusion.

On March 29, 2016 France asked the EU Commission to implement emergency measures pertaining to dimethoate, i.e., an immediate ban of the compound in all EU Member States for all fruits and vegetables and an immediate ban on import and sales in the EU of cherries coming from EU countries or third countries where the use of dimethoate is legal. Tasked by the commission, EFSA concluded on April 12 that data were not sufficient to clearly exclude a risk for the consumer but insisted that the risk of exceeding the Authorized Daily Intake (ADI) was low. EFSA called for a comprehensive review of maximum residue levels. Following the EFSA conclusions the Commission called an emergency meeting with EU Member States on April 15, 2016 to discuss the safety of the active substance. It was concluded by the Commission and the majority of the Member States that it was not appropriate to adopt emergency measures at EU level.

As the Commission did not follow the French request, France implemented a national safeguard clause through a National Decree on April 22, as authorized by Article 54 of EU Regulation 178/2002. The decree was valid until December 31,2016.

The French decree stipulated that:

L'importation et la mise sur le marché en France de cerises fraîches destinées à l'alimentation en provenance d'Etats membres de l'Union européenne ou de pays tiers où l'utilisation de produits phytopharmaceutiques contenant la substance active diméthoate est autorisée en traitement des cerisiers sont suspendues jusqu'au 31 décembre 2016.

Import and marketing in France of fresh cherries for food use coming from EU Member States or third countries where use of phytopharmaceutical products containing the active compound dimethoate is authorized for treatment on cherry trees are suspended until December 31, 2016.
Organic cherries were specifically excluded from this ban and can be exported to France. Frozen and canned/preserved cherries were not/not affected by the ban which applied only to fresh cherries for food use.

The chemical is used legally in the US. Thus, **the French legislation de facto prohibits the exports of U.S. cherries to France**, either directly or through the Netherlands, **a loss of about $1 million annually for U.S. cherry exporters**.

On the other hand, the French ban on dimethoate, if it reduces French production and raises French cherry prices **reducing the competitiveness of the French origin**, **could lead to some market opportunities for U.S. cherries** in traditional French export markets, such as Germany and the U.K.
Subsidies for French cherry producers

The Ministry of Agriculture also set up a subsidy program for cherry producers affected by losses due to Drosphila suzukii. Cherry farmers who can prove losses due to Drosphila suzukii infestation can claim the difference between a target sale level (reference price x reference yield x area) and their real sale figure. The Ministry has disbursed € 5 million in 2016 for this program. Reference prices and yields are

set by the Ministry of Agriculture at a Département (French administrative entity, roughly comparable to a U.S. County) level. When losses exceed 30 percent, the estimated harvest costs are deducted from the subsidy unless the farmer can prove that he harvested the fruit but the cherries were refused by the buyers.

Development in 2017

With no reaction from the Commission and the 2016 decree having expired on December 31, 2016, the French Government sent a request on March 29, 2017 to the EU Commission to take an EU-28 emergency measure under Article 70 of Regulation (EC) No 1107/2009 to ban the use of dimethoate containing plant protection products on cherry trees. It also requested a ban on fresh cherries from cherry trees treated with dimethoate, originating from EU Member States or third countries according to Article 53 of Regulation (EC) No 178/2002.

Because the production had almost started in select countries, the Commission urgently initiated a meeting on April 6-7, 2017 at the Standing Committee on Plant Animals; Food and Feed (PAFF) . At this meeting France justified its request on the basis of frequent detections of high concentrations of dimethoate residues in cherries close to the toxicological reference values, and on the basis of lacking data for certain metabolites. France was concerned that that the new Maximum Residue Level (MRL) measure would be implemented too late to ensure sufficient consumer protection for the 2017 season. The Commission presented its view on the matter and stated that it considers an EU wide emergency measure disproportionate. In its view the conditions for a safeguard measure are not met as there are no indications for a serious health risk. A Regulation has been voted by the Plants, Animals, Food and Feed Committee (PAFF); section Pesticides Residues in its meeting of 16 and 17 February 2017 implementing safe MRLs for dimethoate (and its metabolites) following the EFSA review. The concern of France on the metabolites which were not assessed by EFSA in the prioritised review will be addressed within the renewal exercise. France and most other Member States have already withdrawn their authorisations for dimethoate on cherries following last year´s emergency measure taken by France.

24 Member States informed the Committee about existing authorizations. It was confirmed that authorisations for dimethoate/cherries still exist in Slovakia and Czech Republic. The other Member States reported not to have authorisations for dimethoate/cherries or none at all for dimethoate. Member States which did not take the floor were given the opportunity to comment by 11 April 2017 in writing.

24 Member States expressed positions on the French Emergency measure:

- 8 Member States did not support the French emergency measure;
- 3 Member States were supportive of the French emergency measure;
- 10 Member States had not yet a clear position and may get back to the Commission in writing;
- 3 Member States had no clear position, but indicated that they had some sympathy with the French measure; and
- 2 Member States urged the Commission to have the discussion in the relevant section of the Standing Committee, where the expertise is available.

At the meeting there was no agreement to impose an EU wide emergency measure. Regarding the next

procedural steps the Commission explained that if France takes an emergency measure unilaterally, the Commission has to submit the measure within 10 working days to the Committee in order to confirm, revoke, amend, or extend it to the whole EU. A second meeting of the PAFF section Legislation/Residues may therefore be required.

In the meantime, the French Ministry of Agriculture informed the industry that it intended to reinstate the 2016 ban. A decree similar to 2016 was published on 27 April 2017, prohibiting imports of fresh cherries (with the exception of organic cherries) from countries where dimethoate can be legally used on cherry trees. Therefore, French imports of U.S. cherries are prohibited again in 2017. The decree is valid until December 31, 2017.

Difficult implementation and potential legal issues

To complement the 2016 decree, France published a Notice to Importers on July 13, 2016 establishing an official list of countries authorizing or banning dimethoate. EU countries with prohibited imports included : Austria, Bulgaria, Croatia, Slovakia, Romania and Czech Republic. Third countries with prohibitions included Canada, United States and Turkey. It is expected a similar list will be published in the coming weeks to inform importers of the countries with prohibited cherries for 2017.
A potential problem lies with the cherries used for processing. While the decree prohibits the imports of fresh cherries for food, it does not specifically prohibit nor authorize the imports of cherries for processing for food uses (such as jams, sugar or chocolate coated or preserved cherries). APTUNION, one of the world leaders of sugar preserved cherries is based in Provence and processes annually 8,000 MT of bigarreaux cherries locally produced by 300 farmers. Since the local production may become uncompetitive because of the losses to Drosphila suzukii, it may have to close some of its facilities. It will also lose market share to French competitors using Turkish cherries if they can be imported or to foreign competitors in Turkey or Eastern Europe. To express their anger, local producers cut 300 cherry trees and the spring of 2016 and dumped them in front of local government offices.

What's Next?

French fruit traders and importers hope that the EU Commission will strike down the French decree as illegal because it is not in accord with the EU's single market. However, taking France to the European Court of Justice will take years. Domestic litigation, such as the one at the Conseil d'Etat, will also take time. Traders and importers fear that if the EU commission does not react promptly, France will implement similar domestic bans against other EU-approved pesticides or chemicals, de-facto shutting down the free movement of EU and third countries fruits and vegetables into France.